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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

[redacted]

LYLE KIRKER, ET AL., *Petitioners*,

v.

ARCH A. MOORE, JR., Individually and in His Capacity as Governor of the State of West Virginia, ET AL., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

CHAUNCEY H. BROWNING, JR.
Attorney General of West Virginia
By F. PAUL CHAMBERS
Special Assistant Attorney General
Counsel for Respondents in their Official Capacities
F. PAUL CHAMBERS
JOHN R. LUKENS
LOUIS S. SOUTHWORTH, II
JACKSON, KELLY, HOLT & O'FARRELL
1601 Kanawha Valley Building
Charleston, West Virginia
Counsel for Respondents Moore and Ritchie as individuals
RICHARD E. TYSON
704 Fourth Avenue
Huntington, West Virginia
Counsel for Respondent Riffle as an individual

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT

For convenience, parties will be referred to as follows:

Petitioner Laborers' District Council ("Union")

Petitioner Lyle Kirker ("Kirker")

The twenty other individual petitioners ("Petitioner-Employees")

Respondent Arch A. Moore, Jr., as Governor of West Virginia and individually ("Governor Moore")

Respondent William S. Ritchie as Road Commissioner of West Virginia and individually ("Commissioner Ritchie")

Respondent Ted R. Riffle, as Cabell County Supervisor of the Road Commission and individually ("Riffle")[1]

Respondent, The State Road Commission of West Virginia ("Commission")[2]

References to the Petition for a Writ of Certiorari are designated ("P. Br. ___"), and to its appendix as ("P. Br. A.___")

References to the Appendix are designated ("A. ___")

References to the Unprinted Record are designated ("R. ___")

The facts hereafter stated, except when otherwise expressly noted, are not, in the judgment of counsel for Respondents, in issue in the record before this Court.

Governor Moore was elected Governor of West Virginia on November 5, 1968. He qualified and began his term of office on January 13, 1969. Commissioner Ritchie was appointed State Road Commissioner effective February 1, 1969. (A. 79, 137) Commissioner Ritchie holds has office at the "will and pleasure" of the Governor pursuant to Ch. 6, Art. 7, Sec. 2a of the Code of West Virginia, as amended.

The West Virginia Legislature convened in Regular Session on the second Wednesday in January, 1969 (W. Va. Constitution Article VI, § 18).

On or about February 6, 1969, (A. 32, 138) at the request of Kirker, Commissioner Ritchie met with Kirker,

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[1]Riffle ceased to be Cabell County Supervisor on August 19, 1969 (A. 212).

[2]By Ch. 68 of the Acts of the West Virginia Legislature, Regular Session 1970, the State Road Commission became the West Virginia Department of Highways and the Road Commissioner became the West Virginia Commissioner of Highways.

Kirker said the Union represented a substantial majority (approximately 4,000) of the employees of the Commission and that the Union wanted to discuss "matters concerning terms and conditions of employment" of the employees of the Commission represented by the Union. (A. 32). Kirker wanted a collective bargaining agreement between the Union and the Commission. (A. 138). Commissioner Ritchie advised Kirker that he had just become Road Commissioner and desired time to consider the matter more fully; that the Commission at year end 1968 had 7,445 hourly and salaried non civil service employees and 366 civil service employees; that his office spent several hundred millions of dollars a year in constructing and maintaining state and federal-state highways; that the Legislature of West Virginia was in its biannual 60-day session and as Commissioner he faced many problems in addition to those presented by Kirker. (A. 138)

Shortly after February 6, 1969, Commissioner Ritchie met with Governor Moore, told him of his meeting with Kirker and gave the Governor a copy of the proposed collective bargaining agreement which Kirker wanted the Commissioner to execute. (A. 139) Governor Moore advised Commissioner Ritchie that he believed any public employee had the right to join a union, but that the collective bargaining demands of Kirker raised policy and legal questions which should be considered with care since road employees performed an essential public service and the question of collective bargaining was one of first impression in his position as Governor as well as in Ritchie's position as Commissioner. (A. 130)

By letter to Commissioner Ritchie dated February 10, 1969, Kirker wrote that there were wide spread reports

that large scale replacements in Road Commission personnel would be made by Monday, February 17; that Governor Moore had assured State Road employees that no employee who performed his job need fear Arch Moore no matter what his politics and further stated that he thought it was a shame that anyone should be forced to live in fear of his job because of the way he votes; that notwithstanding Governor Moore's statements such "fear" still persisted; and that he would appreciate advice "whether there is any basis for these fears." (A. 33) Commissioner Ritchie advised Kirker that there was no intention of making large scale replacements of State Road employees and that there was no basis in fact for the "fears" which Kirker expressed in his letter. (A. 138)

On February 11, 1969, while Commissioner Ritchie and Governor Moore had Kirker's demands under consideration, House Bill 883 was introduced in the House of Delegates. On a later day Senate Bill 353, an identical bill, was introduced in the State Senate. (A. 80) These bills were caused to be prepared and introduced by the AFL-CIO. If enacted into law, each would have: (1) authorized employees of the State to organize and bargain collectively; (2) imposed on the State a corresponding duty to bargain with union representatives; (3) given public employees the right to strike; and (4) required the State to check off for the union dues and payments to the union as the employee might authorize. (A. 131 and R. 301)

House Bill 883 and Senate Bill 353 were under consideration by the West Virginia Legislature until its adjournment on March 8, 1969. (A. 131)

House Bill 883 contained proposed legislation in the private labor-management relations sector as well as in the public sector. The House Judiciary Committee reported to the House of Delegates a Committee Substitute for House Bill 883 which retained the provisions as introduced regarding the private sector but which removed the provisions relating to the public sector. Delegate Jones, a Republican from Kanawha County, offered amendments on the floor of the house which would have restored provisions authorizing collective bargaining by public employees. The proposed amendments were defeated on a roll call vote in the House of Delegates on March 5, 1969. (A. 132 and R. 346)

Kirker and Commissioner Ritchie talked on two or three occasions after February 10, 1969, and prior to the beginning of the strike on March 3, 1969. On each occasion Kirker was told his demands were still under study. On February 26, 1969, Kirker told Commissioner Ritchie "a walkout might be imminent" and Commissioner Ritchie told Kirker he had discussed the matter with Governor Moore and that "he would be in further contact with affiant (Kirker) in a few days." (A. 33, 34) At no time did Commissioner Ritchie refuse to talk to Kirker, and it was the Commissioner's consistent position with Kirker before the strike that no decision had been reached as to whether the State would bargain collectively with Kirker and the Union. (A. 138, 139)

Governor Moore was in doubt that the State, absent legislation, could properly enter into collective bargaining negotiations with a union claiming to represent State employees. Moreover, Governor Moore believed that while the Legislature had the subject of collective bargaining by public employees under consideration, it

would have been violative of the concept of separation of powers for the executive branch to have entered into collective bargaining negotiations with Kirker. (A. 133)

On Sunday, March 2, 1969, Kirker publicly announced that a state-wide strike of Commission employees who were members of the Union would begin on March 3. (A. 139) Petitioner-Employees and other union members struck on March 3. Mass picketing and, in some cases, threats of violence were employed by the Union and Petitioner-Employees to bring road maintenance in many areas of the State's fifty-five counties to a complete stop. When reporters for the news media told Kirker on March 3 that snow was expected in some areas of the State that night, he replied, "Well, that's too bad." (A. 139, 140) The strike and picketing shut down maintenance operations of the Commission in additional areas of the State on March 4; damage to State property by strikers was reported as were incidents of obstructing entrances to Commission facilities; and pickets in force caused work to stop on a new $15 million State office building in Charleston and on new road construction. Commissioner Ritchie on March 4 issued a public plea to Commission personnel to return to work because it was "vital that services provided by the State Road Commission to the people of West Virginia be continued without interruption." (A. 140) Kirker told the communication media on March 4 that Commission personnel in 7 of the 10 Districts were "out solid," namely Districts 1, 2, 3, 4, 6, 8, and 10, and that a majority of men in Districts 5 and 7 were out. The object of the strike was "job security, seniority and a grievance procedure," Kirker said. (A. 140, 150)

On March 5, Commissioner Ritchie was entering his office building and met Kirker who asked the Commissioner if he were ready to talk. Commissioner Ritchie invited Kirker to his office. Kirker declined. (A. 140)

Beginning in the afternoon of March 6, serious and dangerous road conditions due to accumulations of snow began to develop. Pleas to return to work by the Commissioner were communicated throughout the State by all communication media. On March 6 and 7, several important roads were not passable, schools were closed, and personal injuries and property damage resulted from lack of maintenance of State highways. (A. 141, 142, 151-157)

The Commissioner again publicly appealed to the strikers to return to work on March 8. (A. 142)

On March 10, fresh snow fell over much of West Virginia, closing roads and schools and causing many accidents and resulting in property damage and personal injuries. (A. 142, 158-166)

Because warming, followed by colder weather and fresh snow had made State roads more hazardous by the morning of March 11, and the strikers, generally, had failed to return to work, Commissioner Ritchie had concluded and so advised Governor Moore at 10:00 a.m. that the public interest required that Commission employees still actively participating in the strike be discharged and replaced. Governor Moore had reached the same conclusion. Both agreed the action to be taken was most serious and that it should be announced by the Governor. (A. 77, 134, 135, 142, 143) An aide was directed to prepare a statement and to call a press conference for 12:00 noon. Governor Moore's complete state-

ment to the media with Commissioner Ritchie by his side (A. 83-91) announced the discharge of the strikers because their refusal to work could no longer be tolerated if the State was to clear highways of ice and snow to protect the health, safety and welfare of the State's citizens. (A. 83-84) Governor Moore made it clear that the implementation of the order and the decision in each individual case were the administrative responsibility of Commissioner Ritchie. (A. 88) The Commission either did not separate from employment, or promptly reinstated, all Commission employees who were not working on March 11, but who were not actively participating in the strike. In all, 1,752 persons, out of 3,843 which the Union claimed to represent were discharged and had not been reinstated as of May 1, 1969. (A. 143, 144) These 1,752 persons were discharged for striking against the State, and for no other reason. (A. 136, 137, 144, 145)

Petitioners do not deny Petitioner-Employees were on strike but argue that the real purpose of Governor Moore was to discharge Democrats in order to implement the "spoils system" and filed in the record an affidavit from Cecil H. Underwood to the effect that Governor Moore in a speech to a Republican "Lincoln Day Dinner" in Parsons, West Virginia, on April 13, 1968, before Moore had been nominated for Governor, said that if he were elected he wanted to "clean 'em out [Democrats] from top to bottom." (A. 122, 123)

The lack of any partisan political motive, if relevant, in terminating the employment of the strikers is established not only by affidavits of Governor Moore (A. 129) and Commissioner Ritchie (A. 137), but by the fact that Governor Moore at the very beginning of his administration appointed Democrats to head major de-

partments in the executive branch of State government, (A. 136), and by the admission of the Union, for purposes other than this litigation, that of approximately 3,400 strikers, approximately 1,400 returned to their jobs and that "there are now (June 3, 1969) approximately 2,000 still on strike." (A. 135, 136)

So far as the record discloses, none of the Petitioner-Employees requested an administrative hearing.

This action was instituted March 21, 1969.

Even after the institution of this litigation Kirker, Union and Petitioner-Employees have caused picketing of Road Commission offices, garage and installations to continue and Union and their AFL-CIO affiliates have attempted to encourage AFL-CIO members throughout the nation to engage in a "tourist boycott" of West Virginia. (A. 121, 122, 145)

None of those discharged were covered by West Virginia Civil Service Laws, either because their positions were excepted from coverage by statute or because affirmative action by the Governor, the Civil Service Commission and the appointing authority necessary to add the positions to the classified service had not been taken. (A. 144, P. Br. 7)

There is no basis in this record for several factual allegations asserted *arguendo* by Petitioners:

1. The statement that certain discharged employees had not in fact actively participated in the strike or were absent from work on March 11, 1969 for unrelated reasons (P. Br. 14, para 1) has no foundation in the record.

2. The statement that the mass discharge was improperly motivated by the desire to create patronage jobs

for the Governor's political allies (P. Br. 14, para 2) is contrary to the undisputed facts of the record, unless the statement allegedly made by Governor Moore before he was nominated creates such an issue.

3. The statement that the discharges were in retaliation for the employees having joined a union (P. Br. 14, para 3) is contrary to the undisputed facts of the record.

4. The statement that since there are no West Virginia statutes, court decisions or Commission regulations declaring strikes by state employees to be unlawful, the employees were not subject to being discharged for participating in the strike fails to give recognition to (a) the provisions of the West Virginia Constitution making the common law the law of West Virginia;[3] (b) fails to recognize the admitted knowledge of Kirker and his union that public employees do not have the legal right to strike in West Virginia and that strikes may result in dismissal from employment (A. 44, A. 62, A. 99) and (c) fails to recognize the law as set forth in the opinions of West Virginia Attorneys General placed in the record in this case by Petitioners themselves (A. 102-115).

The Proceedings in the District Court

Following the discharge of road maintenance workers striking against the State, on March 11, 1969, Kirker and the other petitioners on March 21, 1969 (not March 29) (A.2) instituted this action against Respondent Moore as Governor and individually, Respondent Ritchie as State Road Commissioner and individually, Respondent the State Road Commission of West Virginia, a cor-

[3]W. Va. Const. Art. VIII. § 21 (p. 1a, *infra*); see also W. Va. *Code*, ch. 2, art. 1, § 1 (Michie 1966) (p. 3a, *infra*).

porate agency of the State, and Respondent Riffle, as Cabell County Supervisor of the maintenance force of the Road Commission and individually. (A. 8).

The Complaint, grounded on the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleged the discharge of Petitioner-Employees and others similarly situated because of "union activity" (A. 9) as well as other grounds referred to in the Petition.

The relief sought by the Complaint includes: judgment against Governor Moore in his official capacity and individually, and the Commission, jointly and severally, for loss of income from March 11, 1969 to date of judgment; a mandatory injunction requiring Commissioner Ritchie to meet with Kirker, as the representative of Petitioner-Employees, to seek to redress grievances; exemplary damages against all defendants, jointly and severally in an amount of $250,000.00; reasonable attorney fees and costs; an order setting aside the dismissal of Petitioner-Employees and an injunction prohibiting discrimination against employees or applicants for employment of the Commission on the basis of political or union "affiliation or activity". (A. 11, 12)

Respondents filed notice of motions and motions to dismiss; Petitioners filed a motion for a preliminary injunction and a motion for determination that the action was maintainable as a class action; Petitioners and Respondents each served on opposing counsel and filed affidavits, the affidavits of Governor Moore and Commissioner Ritchie being served on Petitioners on July 14, 1969 and ordered filed as of that date (A. 128, 129).

All motions were brought on for hearing on August 19, 1969 (P. Br. A. 5a), at which time Petitioners filed an additional affidavit (A. 122) and Respondents filed a

memorandum from Kirker, dated July 7, 1969, addressed to "The Striking State Road Commission Employees".

As is demonstrated in the Opinion of the District Court (P. Br. A. 3a-20a), the Supplemental Opinion (P. Br. A. 21a-25a) the letter from the District Judge to Counsel dated August 25, 1971 (A. 221) and the *nunc pro tunc* order as of July 13, 1969, approved for entry by Counsel for Petitioners (A. 128), it was quite clear that the Court intended to consider the proof offered by Petitioners and Respondents in passing on Respondents' motions to dismiss, argued and submitted on August 19, 1971.

On August 21, 1969, Petitioners filed a motion for the production of documents which was brought on for hearing on September 12, 1969, and affidavits by Governor Moore (A. 219), Commissioner Ritchie (A. 213) and Respondent Riffle (A. 212) were filed in opposition to the motion. The motion was denied for the reasons stated by the District Court in its Supplemental Opinion (P. Br. A. 21a, 23a).

Restatement of Questions Presented

This case arose out of the summary discharge by the Governor and State Road Commissioner of West Virginia of Petitioner-employees and other striking road maintenance employees of the State on the basis of a "record demonstrating without contradiction that the plaintiffs (Petitioners) had refused to perform their duties under conditions of extreme peril to users of the state's highways." (quoted language from the *Per Curiam* opinion of the Court of Appeals, P. Br. A. 1a).

1. With respect to the Petitioners' statement of first question, in Respondents' reading of the record the ques-

tion is whether the discharged Petitioner-Employees were entitled to a "pre-termination" administrative hearing, since the record contains no evidence that a post-termination hearing was requested.

2. With respect to Petitioners' description of the second question presented, Respondents do not believe that there is in the record any evidence sufficient to establish a genuine issue of material fact regarding the motivation for the discharges.

If certiorari is granted, this case raises the following additional questions for review:

3. Whether the Eleventh Amendment constitutes a defense to the maintenance of this action.

4. Whether the State Road Commission of West Virginia, the Governor of West Virginia and the State Road Commissioner of West Virginia, in their official capacities, are "persons" within the meaning of that term in 42 U.S.C. § 1983.

5. Whether Respondent Arch A. Moore, Jr., as an individual and William Ritchie, as an individual, are immune from the money and damage claims in this action.

ARGUMENT

Petitioners advance no sound reason for granting the writ. (P. Br. 11 *et seq.*)

I. The decision below does not conflict with any decision of this Court requiring a hearing in connection with terminating public employment.

A. The cases, expounding what is often described as the "unconstitutional conditions doctrine" (P.Br. 11, 12), (which Petitioners say is best represented by *Slochower* v. *Board of Higher Ed.*, 350 U.S. 551 (1956), which voided a New York statute which automatically termi-

nated the public employment of one who invoked the Fifth Amendment privilege against self incrmination), are inapposite. This is not a case of public employees being discharged for exercising constitutional rights, unless the Court were to hold that public employees have a constitutional right to strike.

B. The line of cases, represented by *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971), imposing due process requirements where the state attaches a "badge of infamy" to a citizen is not relevant to the facts in this case. Striking, both in the private and public sector, has become so commonplace in American society that a discharge for that reason cannot be equated with a badge of infamy.

Goldberg v. *Kelly*, 397 U.S. 254 (1970) is inapposite because it is an extension of a principle previously enunciated by the Court that when the legislature has seen fit to limit the grounds for denying, reducing or terminating certain benefits, the administering agency must observe certain minimal procedural standards to test whether facts warranting the action existed. The majority in *Goldberg* v. *Kelly, supra*, recognized that constitutional claims to procedural due process are not absolute, citing the exception recognized in *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961).[4]

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[4]After quoting from a portion of the opinion in that case and stating in *Goldberg* at 397 U.S. 263 that, "It is true, of course, that some government benefits may be terminated without affording the recipient a pretermination evidentiary hearing," the majority in footnote 10 cited supporting cases and said, in part:

"In *Cafeteria & Restaurant Workers Union* v. *McElroy*, supra, at 896, 6 L Ed 2d at 1237, summary dismissal of a public employee was upheld because '[i]n [its] proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control,' and because the case involved the Government's 'dispatch of its own internal affairs.' *Cf. Perkins* v. *Lukens Steel Co.*, 310 US 113, 84 L Ed 1108, 60 S Ct 869 (1940)."

The majority of one in *Goldberg* required a pretermination hearing, in part, because of humanitarian concern about the ability of the average welfare recipient to live, and the fear that the terminated welfare recipient would not be able "to seek redress from the welfare bureaucracy". *Id.* at 264. There is no evidentiary support in this record to support such a rationale.[5]

The facts in *Cafeteria & Restaurant Workers Union* v. *McElroy, supra,* were that a short-order cook in a cafeteria operated on the premises of a Navy ordnance installation had been refused permission to enter the premises on the ground that she was a "security risk." The employee had been employed for six years by her employer, the M & M Restaurant, Inc. and her work record was entirely satisfactory. The union representing the employee requesfed a hearing before officials of the installation. This request was denied and an action was commenced in the United States District Court to compel the return to the short-order cook of her identification badge. The petitioners claimed that due process required that the exployee be advised of the specific grounds for her exclusion and that she be awarded a hearing at which she might refute

[5]It should be noted that the language relied on by Petitioner from *Ricucci* v. *U.S.* 425 F.2d 1252 (Ct. Cl. 1970) equating the legal and economic hardship of a terminated welfare beneficiary with a discharged government employee was concurred in by only two of seven Judges. More cogent is the District Court opinion in *Herriges* v. *U.S.*, 314 F. Supp. 1352 (D. Mont. 1970), which points out that in terms of the ability of government to function, nothing depends on "John Kelly and his fellow welfare recipients," but on governmental employees rests the ability of government to function. The Court added:

> "I am not tempted, using the decision in *Goldberg* as a springboard, to discover new due process rights which would undercut long established administrative procedures. The recent discovery by public employees of all levels of government that under our general system of due process, laws cannot be enforced against mass violators of law and that the no strike law applicable to government employees and injunctions issued under them can be violated almost with impunity has immeasurably increased the burdens of the executive department. It ill behooves the judiciary at this time in our history to add to those burdens by the enlargement of due process concepts." 314 F. Supp. 1352, 1355.

them. The United States Supreme Court flatly rejected this contention and held that such a procedure was not constitutionally required.

The government function involved here—maintaining state highways and, in the instant case, clearing them of snow and ice—is vital to safe transportation, to commerce, to the operation of schools and to the functioning of state and local government. Maintenance of highways is purely a matter of internal state responsibility. The federal government provides aid in the construction of some highways, but not in their maintenance. States have traditionally exercised "unfettered control" in the employment, control and termination of its employees, engaged in such purely internal affairs, and *Cafeteria & Restaurant Workers Union, supra,* is controlling. *Cf. Jenson* v. *Olson,* 353 F.2d 825, 828 (8th Cir. 1965).

Petitioners urge that since there is no West Virginia statute or court decision declaring strikes by public employees to be unlawful they could not be discharged for participation in a strike.

There is, of course, no federal right for public employees to strike, unless the state or public body is an employer under the Railway Labor Act.[6]

While it is true that there are no reported West Virginia court decisions declaring strikes by public employees to be unlawful and there are no West Virginia statutes so providing, the common law is the law of West Virginia unless changed by statute,[7] and Petition-

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[6]Congress has created a federal right to strike, but only in the case of Railway employees (Railway Labor Act, 45 U.S.C. § 151 *et seq*) and in the private sector of employment (Labor Management Relations Act, 29 U.S.C. § 152 (2) (3)).

[7]W. Va. *Const.*, Art. VIII, § 21 (p. 1a, *infra*); W. Va. *Code*, ch. 2, art. 1, § 1 (Michie 1966) (p. 3a., *infra*).

ers themselves have placed in the record evidence showing that it is the opinion of West Virginia Attorneys General that strikes by public employees are unlawful in this jurisdiction, (A. 102-115) and evidence showing that Kirker and his union have acknowledged in agreements made with public bodies that public employees do not have the legal right to strike in West Virginia and that strikes may result in dismissal from employment (A. 44, 62, 99)

The District Court collected and analyzed the law and concluded that strikes by public employees in West Virginia are illegal and that under the circumstances existing on March 11, 1969 "the Governor and the State Road Commissioner had the right, if not indeed the responsibility, to terminate the plaintiff's employment with the State." We can add nothing to the able exposition of the law by the District Court, which is adopted by reference (P.Br. A. 3a, 12a-16a).

C. Petitioners' argument that their exclusion from coverage under West Virginia's Civil Service System deprives them of equal protection of the laws is completely without merit and if it had merit the court would invalidate the statute, rather than legislate Petitioner-Employees within its coverage.

There is certainly nothing remarkable in the fact that the West Virginia Legislature, in enacting the state civil service law, chose to make eligible for coverage thereunder only a portion of state employees to whom it might ultimately be desirable and practical to afford such coverage. Gradualism has been the key to the approach followed under the federal civil service law, under which the President has been authorized to bring employees, by executive order, under the Act, *United*

States v. *Wickersham*, 201 U.S. 390 (1906), and also under numerous state civil service acts. See, *e.g.*, *Schmitt* v. *Hunt*, 359 P.2d 198 (Okla. 1960).

Additionally, the fact that reforms of many kinds may be brought about gradually without violating the Equal Protection Clause has been recognized in numerous decisions. For example, in *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955), an Oklahoma statute regulating visual care was attacked on the ground, *inter alia*, that it constituted invidious discrimination and hence violated the Equal Protection Clause. In upholding the statute, the Court stated:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies * * * [T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Accord, *American Federation of Labor* v. *American Sash & Door Co.*, 335 U.S. 538, 541 (1949).

Although not cited by the Petitioners, the equal protection argument has been raised unsuccessfully with respect to exemptions from civil service statutes in other cases, including *Ricks* v. *Department of State Civil Service*, 200 La. 341, 8 So.2d 49, 55, 56 (1942); *State ex rel., McKittrick* v. *Kirby*, 349 Mo. 988, 163 S.W. 2d 990, 994 (1942); and *Shelby* v. *City of Pensacola*, 112 Fla., 584, 151 So. 53, 55 (1933).

II. Petitioners contend certiorari should be granted because of an alleged conflict among the circuits regarding the necessity of a hearing where non-tenured teachers are dismissed or their contracts are not renewed

(P. Br. 16, 17). These cases are inapposite, involving as they do public employees in the teaching area where this Court has recognized a unique danger to First Amendment freedoms. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967), overruling *Adler* v. *Board of Education*, 342 U.S. 485 (1952). Moreover, the cases alleged to be in conflict do not involve a strike or refusal to work, nor do they involve employees rendering essential services necessary for government to function.

III. It is contended that there was a "genuine factual issue regarding the true motivation of the discharges" (P. Br. 18). When the President or the Chief Executive of a state, charged by the federal or a state constitution to see to the faithful execution of the laws, takes action within the perimeter of his power for an asserted proper purpose, clearly warranted by the facts and the law, Respondents cannot conceive that he will be subjected to the harrassment of discovery proceedings and a trial because it is claimed he acted from some ulterior motive. Petitioners cite no judicial precedent for their novel theory. But even if the theory were sound we submit there is no relevant evidence in the record creating an issue of material fact.

IV. Petitioners' urge certiorari because of "the substantial number of employees who were adversely affected," (P. Br. 19) adding that the questions raised are of interest to "literally millions," of public employees. The fact that there were so many strikers would have made pre-termination hearings impossible unless the roads of West Virginia were to go without maintenance. Post-termination hearings were never requested by Petioners. Instead they immediately instituted this action.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

CHAUNCEY H. BROWNING, JR.
Attorney General of West Virginia
By F. PAUL CHAMBERS
Special Assistant Attorney General
Counsel for Respondents in their Official Capacities
F. PAUL CHAMBERS
JOHN R. LUKENS
LOUIS S. SOUTHWORTH, II
JACKSON, KELLY, HOLT & O'FARRELL
1601 Kanawha Valley Building
Charleston, West Virginia
Counsel for Respondents Moore and Ritchie as individuals
RICHARD E. TYSON
704 Fourth Avenue
Huntington, West Virginia
Counsel for Respondent Riffle as an individual

June 24, 1971

APPENDICES

STATUTORY APPENDIX

CONSTITUTION OF THE STATE OF WEST VIRGINIA

* * *

ARTICLE VII, § 5.

Chief Executive—Powers.

The chief executive power shall be vested in the governor, who shall take care that the laws be faithfully executed.

* * *

ARTICLE VII, § 18.

Executive Heads to Make Reports

The subordinate officers of the executive department and the officers of all the public institutions of the State, shall, at least ten days preceding each regular session of the legislature, severally report to the governor, who shall transmit such report to the legislature; and the governor may at any time require information in writing, under oath, from the officers of his department, and all officers and managers of State institutions, upon any subject relating to the condition, management and expenses of their respective offices.

* * *

ARTICLE VIII, § 21.

Parts of Common Law Effective

Such parts of the common law, and of the laws of this State as are in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the legislature. All civil and criminal suits and proceedings pending in the former circuit courts of this State, shall remain and be proceeded in before the circuit courts of the counties in which they were pending.

* * *

UNITED STATES CODE

* * *

29 U.S.C. § 152.

Definitions

When used in this subchapter—

* * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

WEST VIRGINIA CODE

* * *

§ 2-1-1.

Common law.

The common law of England, so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the legislature of this State.

* * *

§ 6-7-2a.

Terms of certain appointive state officers; appointment; qualifications; powers and salaries of such officers.

Notwithstanding any other provision of this Code to the contrary, on and after the effective date of this section [January 21, 1969] each of the following named appointive state officers shall be appointed by the governor, by and with the advice and consent of the senate. Each of such appointive state officers shall serve at the will and pleasure of the governor and until the respective state officer's successors have been appointed and qualified. Each of such appointive state officers shall hereafter be subject to the existing qualifications for holding each such respective office and each shall have and is hereby granted all of the powers and authority and shall perform all of the functions and services heretofore vested in and performed by virtue of existing law respecting each such office. The annual salary of each such named appointive state officer shall be as follows:

The state road commissioner, thirty thousand dollars;

* * *